83-1499 (1)

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No.

In the Supreme Court of the United States

October Term, 1983

ROBERT E. O'BRIEN,
Petitioner,

vs.

PENNSYLVANIA STATE EMPLOYEES' RETIREMENT SYSTEM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether the Pennsylvania Supreme Court violates the due process clause and the equal protection of law clause of the Fourteenth Amendment of the United States Constitution by affirming a lower court order barring this matter as *res judicata* where the said *res judicata* is based on lower court decisions which incorrectly apply an invalid section of the Pennsylvania Retirement Code in their determination.

2. Whether the Supreme Court of Pennsylvania, consistent with the due process of law clause and equal protection of law clause under the United States Constitution, erred in not deciding that the Pennsylvania State Employes' Retirement Board has not and can not lawfully comply with the previous orders and opinions of the Pennsylvania state courts in the cases *State Employes' Retirement Board v. O'Brien,* 93 Dauphin 101 (1970), and *O'Brien v. State Employes' Retirement Board,* 12 Pa. Commonwealth Ct. 49, 315 A.2d 899 (1974).

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JUDICIAL OPINIONS DELIVERED BELOW

The opinion of the Supreme Court of Pennsylvania in this matter is reproduced in Appendix A together with the judgment of the Supreme Court, as reported at 2 Middle District Appeal Docket 1983. Petitioner's application for reconsideration of the opinion and judgment of the Supreme Court of Pennsylvania was denied by order entered February 3, 1984 and transmitted to Petitioner by letter of the Deputy Prothonotary, February 6, 1984. A copy of this letter is reproduced in Appendix B (denial of a hearing). The opinion of the Commonwealth Court of Pennsylvania appears in Appendix C of this petition. That decision is reported at 1268 C.D. 1982. The decision of the Commonwealth Court of Pennsylvania, reported as *O'Brien v. State Employes' Retirement Board,* is reproduced in Appendix D. This decision and order is reported at 12 Pa. Commonwealth Ct. 49, 315 A.2d 899 (1974). The decision of Dauphin County Court of Common Pleas in this matter, reported *sub nom State Employes' Retirement Board v. O'Brien* is reproduced in Appendix E and is reported at 93 Dauphin 101 (1970).

Jurisdiction and Statutes and Constitutional Provisions Involved

JURISDICTION

The order of the Supreme Court of Pennsylvania sought to be reviewed was entered on December 14, 1983. On December 21, 1983 Petitioner filed Petitioner's application for reconsideration which was denied by the Supreme Court of Pennsylvania on February 3, 1984 and Petitioner's attorney notified of this order by the Deputy Prothonotary of the Supreme Court by letter dated February 6, 1984. A copy of this notification is reproduced in Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Pennsylvania State Employes' Retirement Code of 1959, Section 207(1) of the Act of June 1, 1959, P.L. 392, *as amended,* 71 P.S. 1725—207(1), Sections 207(5), 302(2)(i) and 302(2)(k)(b) of the same Act. These sections are reproduced in Appendix F. The constitutionality of the decision and order of the Supreme Court of Pennsylvania herein cited, in denying Petitioner on grounds of *res judicata* a hearing before the Pennsylvania State Employes' Retirement Board.

The constitutional provisions involved in Amendment XIV to the Constitution of the United States which is reproduced in Appendix F.

STATEMENT OF THE CASE

Petitioner, Col. Robert E. O'Brien, as an employe of the Commonwealth of Pennsylvania was inducted into the military service effective February 17, 1941, by Executive Order of the President of the United States (No. 8633 Jan. 14, 1941) and under the provisions of the Army Reserve and Retired Personnel Service Law of August 27, 1940 (54 Stat. 860) for a "period of service" of twelve months.

This "period of service" is defined in this law as:

> ". . . the period beginning with the date on which such person is ordered into such active military service and ending with the date on which he is relieved from such service" (54 Stat. 860).

This "period of service" was extended for eighteen months by Executive Order No. 8862, August 21, 1941.

This "period of service" was further extended to include World War II, and the Korean Conflict which overlapped it, plus six months, by the Selective Service Extension Act of 1941:

> "The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section" which is: "during the existence of any war in which the United States is engaged, and during the six months immediately following. . . ." (55 Stat. 800 Section 2)

Statement of the Case

The Korean Conflict, insofar as veterans' employment and retirement rights are concerned, was terminated January 31, 1955, by Presidential Proclamation (69 Stat. C17).

Six months thereafter, July 31, 1955, Petitioner was serving in the armed forces under the original authority under which he had been inducted into the military service, and was and had been an inducted member of the armed forces, and continued to serve under his original obligation until he was discharged from it effective September 30, 1957 (Army Reserve and Retired Personnel Act of August 27, 1940, 54 Stat. 860).

All of this service was performed in a time of war, or contemplated war, or armed conflict, and, for that portion of it subsequent to May 27, 1941, a time of unlimited national emergency. Presidential Proclamation No. 2487 (55 Stat. 1647).

Petitioner returned to state employment June 1, 1961 and retired from this employment June 30, 1967. He applied for credit for retirement for that "period of service" to which he was called from state employment from February 17, 1941 to September 30, 1957, not "all of his military service" as asserted by the court in 93 Dauphin 101, page 5. Petitioner's various periods of military service cover a span of forty years.

Petitioner, since August 20, 1961 requested the Pennsylvania State Employes' Retirement Board for credit for retirement for "the period in which he was in the military service" from February 17, 1941 until September 30, 1957.

An "Adjudication" by Richard Witmer, then Secretary of the Board, undated but occurring on or about December 12, 1969, has granted Petitioner credit for military

service from May 1, 1942 to February 1946, and has denied credit for military service subsequent to that date. His check dated September 3, 1964 in the amount of $1,722.35, covering salary deductions for the period in question, was returned by the Pennsylvania Attorney General September 28, 1964.

The Pennsylvania Dauphin County Court of Common Pleas, by order dated September 8, 1970, *State Employes' Retirement Board v. O'Brien,* 93 Dauphin 101, affirmed the adjudication of the Secretary of the State Employes' Retirement Board and dismissed the appeal at the cost of Petitioner. Further appeal to the Pennsylvania Commonwealth Court was dismissed [275 Commonwealth Docket (1974)] by order of March 5, 1974.

Following the decisions by the Commonwealth Court, Petitioner sought to appear before the Board to learn how his retirement was being computed. As stated in the Respondent's brief, pages 2 and 3 (Brief for Respondent (Appellee) Retirement Board, Sur Preliminary Objections) in April 1971, February 24, 1972 and January 30, 1973, "Col. O'Brien requested a hearing before the Board to determine the amount and manner of his retirement payment and in each case was denied such a hearing." The Board indicated that the request was denied because it was seen as an attempt to reopen the case. Actually the Board never learned Petitioner's specific reasons for requesting a hearing in that in all cases his right to a hearing was denied. This may well be an index to the responsiveness of the Board to hearing Petitioner's request.

To bring the matter up to date, in February, 1981 Petitioner requested to appear before the Board to determine the method of calculation of his retirement, the law that the

Board was applying and to bring to the Board's attention that it may be applying an incorrect section of the law in interpreting the prior decisions of the Dauphin County Court and Commonwealth Court. *Petitioner's efforts were directed to these areas and not to reopening the entire case* as the Board sets forth in its brief (italics ours). The Board granted Petitioner an informal "five minutes". Mr. Moran of the Board states ". . . Mr. O'Brien, we are going to give you five minutes." The Board never heard Petitioner's reasons as to why it was not complying with the rulings of the Commonwealth Court citing specific statutes. Petitioner was permitted to make a single statement as to this, after which he was cut off. At the Board meeting of March 18, 1981 the Board denied Petitioner's request for a hearing. It did not consider the reasons set forth by Petitioner, nor the specific sections of the law which were being applied to Petitioner's case. The Board then indicated, "Col. O'Brien's only recourse is through the courts."

In compliance with the Board's suggestion, Petitioner then filed a petition for review with the Commonwealth Court, not as a review of his entire case but only a request that the Board inform him as to the law and computation of his retirement and that the Board grant him a formal hearing to allow him to demonstrate that the Board has not and can not lawfully comply with the orders of the Dauphin County Court and the Pennsylvania Commonwealth Court in his case.

A preliminary objection to this petition for review was filed by the Retirement System. After argument October 12, 1982, the Commonwealth Court (Judge Lehman) sustained the preliminary objection. Petitioner's application for reconsideration was denied by the Pennsylvania Com-

monwealth Court by order November 5, 1982. Petitioner then appealed the decision before the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania in its opinion and judgment of December 14, 1983 ordered and adjudged that the order of the Pennsylvania Commonwealth Court be affirmed. This order was based on the grounds of *res judicata*—or that the matter had already been determined by the previous decision of the Pennsylvania Dauphin County Court [*Commonwealth of Pennsylvania State Employes' Retirement Board v. Robert E. O'Brien,* No. 825 Commonwealth Docket 1969, 93 Dauphin 101 (1970)] and Pennsylvania Commonwealth Court [*O'Brien v. State Employes' Retirement Board,* No. 275 C.D. 1973, 12 Pa. Commonwealth Ct. 49, 316 A.2d 899 (1974)].

A federal question of due process is raised in that the Pennsylvania Supreme Court and Pennsylvania Commonwealth Court failed to follow proper due process or equal protection of the law—and failed to properly evaluate the prior decisions of the Pennsylvania Dauphin County Court and Pennsylvania Commonwealth Court arriving at the conclusion that *res judicata* applied. This is further developed in the following Reasons for Allowance of the Writ.

REASONS FOR ALLOWANCE OF THE WRIT

The Supreme Court of Pennsylvania cites *res judicata* as reason for sustaining the preliminary objections in this case in affirming the decisions of the lower courts. *Res judicata* in effect means the issues of this case have been decided in previous decisions. We disagree, and submit that the two previous decisions of the Pennsylvania courts upon which this decision is based [*State Employes' Retirement Board v. O'Brien,* 93 Dauphin 101 (1970); *O'Brien v. State Employes' Retirement Board,* 12 Pa. Commonwealth Ct. 49, 316 A.2d 899 (1974)], when reasonably interpreted, do not properly adjudicate the issue and can not be complied with in the light of existing law. These prior court decisions do not indicate the specific sections of the Retirement Code. They do apply an invalid section [207(5)] of the Code. The Board in turn applied the Code incorrectly. The interpretation of what section to apply is made difficult in that the Code has been amended several times on differing dates. Some amendments [Section 207(5)] occurred after Petitioner had returned to state service in 1961 and, hence, do not apply to this case. Earlier sections of the Code do apply [Section 207(1)].

The Dauphin County Court in its 1970 opinion states, "the law specifically limits credit for service to five (5) years". The court obviously erroneously applied Section 207(5) of the Pennsylvania Retirement Code. The court obviously was applying this section for no other specific section of any law citing "five (5) years" was in existence at the time. Section 207(5) is not applicable to this case in

that it came into existence in 1965, was amended in 1968, after Petitioner had returned to state service in 1961, and applied in that year for retirement credit for military service under the law in effect in 1961. Thus Section 207(1) in effect in 1961 is applicable, and Section 207(5) enacted in 1965 and amended in 1968 is not.

Hence, the true issue was never considered or acted upon by the court at all and, therefore, this issue can not be *res judicata.*

This confusion is well illustrated in the present case. Judge Lehman of the Pennsylvania Commonwealth Court in his opinion of October 18, 1982, page 3 [15a], last paragraph, applies Section 207(5) to Petitioner's case. Judge Lehman states that the *previous* courts *did apply* this section. We maintain that Section 207(5) can not be applied to the present case and this is affirmed by the Pennsylvania Supreme Court in its 1983 decision. It would seem, therefore, that the Retirement Board *has not* been properly applying the correct ruling of the Commonwealth Court. We submit that a Board hearing should be granted Petitioner, as he requests, to resolve this issue. A more detailed explanation follows.

The Pennsylvania Supreme Court in its opinion of December 14, 1983 (footnote 6) indicates the error of Judge Lehman in the application of Section 207(5) as "simply *obiter dicta* and apparently results from the understandable failure of a busy court to fully trace the legislative history of Section 207(5) to determine its text when appellant retired." A careful reading of Judge Lehman's opinion will clearly indicate this not to be so. His erroneous application of Section 207(5) was fundamental and essen-

tial to his decision and illustrates well his interpretation of the Pennsylvania Dauphin County Court's opinion (upon which this entire issue is based) as applying Section 207(5) of the Retirement Code. It has now (for the first time) been resolved that Section 207(5) never applied to this case, as the Pennsylvania Supreme Court clearly explains in the same footnote 6 *supra*: "Thus this section [207(5)] had no application to Petitioner who retired from state service June 30, 1967."

This issue clearly has been misconstrued by the courts since the original error of the Dauphin County Court in 1970. The Petitioner has since that time been diligently attempting to correct this error.

The Petitioner is a recipient of retirement compensation from the State Employes' Retirement Board for a portion of his period in the military service.

On September 8, 1970, the Court of Common Pleas of Dauphin County, Pennsylvania, acting as the Commonwealth Court rendered an opinion, No. 825 Commonwealth Docket 1969, 93 Dauphin 101 granting Petitioner retirement compensation for his period of military service. A copy of this opinion is attached hereto as Appendix E. Said opinion states, in part, "the law specifically limits credit for service to five (5) years". The court must refer to Section 207(5) in that it was the only statement of "five (5) years" in existence in the Retirement Code at the time of this ruling.

On February 3, 1975 Joseph R. Fuller, Annuity Division, State Employes' Retirement System issued Petitioner state treasurer's check No. 703624 in the amount of $5799.64 and in an accompanying letter stated, "representing the

adjusted annuity payment to you covering the period July 1, 1967 to February 1, 1975".

The Retirement Board required Petitioner to pay single salary deductions. The Retirement Code of 1959 (1959, P.L. 1853) Section 302(2)(i), provides that an employe "pay into the fund an amount which shall be equal to the periodic salary deductions multiplied by the number of the pay periods during which he was absent from State employment or State service in active military service. . . ." This section provides for "single salary deductions". There is no mention in this Code of a five-year limitation of credit for the service in the Armed Forces. A copy of Section 302 of the Retirement Code of 1959, in part, is attached hereto as Appendix F.

Section 207(5) (1968, P.L. 1217), in part states an employe "shall be entitled to have full credit for each year or fraction thereof not to exceed five (5) years of service in the Armed Forces of the United States upon his payment to the fund of back contributions according to the provisions of Article III Section 302 subsection 2". This subsection provides for "double salary deductions". A copy of Section 207(5) is attached hereto as Appendix F.

The State Employes' Retirement Board has incorrectly applied the law to Petitioner's case. If the Board wishes to take "single salary deductions" (which they have done) under Section 302(2)(i) from Petitioner, then they must not limit his retirement credit to five years. If the Board applies Section 207(5) (1968, P.L. 1217) which limits retirement credit to five years, then they must take payment of back contributions of "double salary deductions" in accordance with Article III Section 302, subsection 2(k)(b) (which they have *not* done).

On February 18, 1981 Petitioner informally presented this matter before the State Employes' Retirement Board requesting that the Board indicate which section of the law they are applying in calculating his retirement. He also requested that the Board grant him a formal hearing to demonstrate why, under the Commonwealth Court opinion, No. 825, the Board is not lawfully complying with the ruling of the court. On March 18, 1981 the State Employes' Retirement Board refused to grant Petitioner a formal hearing in this case or to indicate the section of the law applied in computing his retirement. The Board indicated that it had no authority to act in the matter and that Petitioner's only recourse was to the Commonwealth Court.

Since it is impossible for either party to this dispute lawfully to comply with the ruling of the court in No. 825 Commonwealth Docket, 1969, and since the court applies an inapplicable section of the Code, the doctrine of *res judicata* may not be applied under the subsequent ruling of the court No. 275 C.D. 1973, a copy of which is attached hereto as Appendix D. Petitioner sought relief by petition for review, *Robert E. O'Brien v. State Employes' Retirement Board,* No. 1268 C.D. 1982, requesting the Commonwealth Court to order the Board to:

1. Inform Petitioner as to what section of the law is applied in determining his retirement benefits and how his benefits have been computed.

2. Grant Petitioner a formal hearing to demonstrate that under Commonwealth Court opinion No. 825 the Board has not and can not lawfully comply with the order of the court.

At hearing upon this matter of preliminary objections by the Board before Senior Judge Paul S. Lehman October 12, 1982, it was held that "computation of the petitioner's retirement account under Section 207(1) was subject to the five-year limitation on credit for military service contained in Section 207(5) of the Act, 77 P.S. §1725-207(5)," and preliminary objections granted. Reconsideration was denied November 5, 1982.

The Supreme Court of Pennsylvania, in its opinion and order of December 14, 1983, affirms the order of the Pennsylvania Commonwealth Court on grounds of *res judicata* sustaining the Retirement Board's preliminary objections, thus defeating Petitioner's original petition.

The Fourteenth Amendment of the United States Constitution guarantees the right to due process of law and equal protection of the laws to every citizen. This right is violated when a state appeal court misinterprets a state statute and applies a void section of the law in arriving at a decision affecting the property (retirement pension) of a citizen.

In the final analysis, the first court review of this case, the Dauphin County Court of Common Pleas, applied a section of the Retirement Code, Section 207(5), that was completely inapplicable in determining Petitioner's retirement benefits were limited to five years. This error has been perpetuated and affirmed up to the present decision of the Pennsylvania Supreme Court. The application of an inapplicable section of the law constitutes a violation of the due process clause and the equal protection of the laws clause found in the Fourteenth Amendment of the Constitution of the United States, hence *res judicata* does

not apply. Petitioner solicits your Honorable Court to so decide in overturning the *res judicata* decision of the Pennsylvania Supreme Court and remanding the case to the Pennsylvania Retirement Board for recomputation of Petitioner's retirement based on a period of from February 17, 1941 until September 30, 1957. We submit and request the Supreme Court of the United States so rule, overturning the decision of the Supreme Court of Pennsylvania.

CONCLUSION

For these reasons a writ of certiorari should issue to review the decision of the Supreme Court of Pennsylvania.

OTHER MATTERS FOR CONSIDERATION

In addition to the preceding argument, the following matters should also be considered by your Honorable Court.

The soundness of Petitioner's position is clearly set forth in the United States Supreme Court case *Bunnell v. New England Teamsters and Trucking Industry Pension Fund,* 655 F.2d 451 (1981). In interpreting the Veterans' Reemployment Rights Act, 38 U.S.C. Sections 2021-2026, relative to seniority and pension rights, the court states, "This obligation (pension funds) applies to *voluntary enlistees* as well as inductees" (italics ours). This case is based on *Alabama Power Co. v. Davis* (1977), 97 S.Ct. 2002, 52 L.Ed 2d 595, a similar veteran's case affirming pension rights.

Aside from your Petitioner's admitted personal preference to remain in the military service—his job with the Commonwealth had been abolished and the Commonwealth had no obligation to rehire him—he remained in the service because his services were needed. This cannot be argued, because there was no authority to retain him unless, in the judgment of the President, operating through the Selective Service System, his services were needed. Officers who were not needed were discharged. If he had left the service in February, 1946, his place would have been taken, at possible sacrifice or hardship, by an inductee, or another officer who would have voluntarily replaced him, and been granted retirement rights as fully as those your Petitioner claims.

Other Matters for Consideration

Credit for this "period of service" may not be denied because any portion of it was served voluntarily, nor can a series of "category commitments" be considered as voluntary extensions of service. It cannot be denied by reason of any benefits accruing under the retirement laws of the United States. Section 454(f) of the Military Selective Service Act of 1948 states:

> "Notwithstanding any other provision of law, any person who is inducted into the armed forces under this Act and who, before being inducted, was receiving compensation from any person may, while serving under that induction, receive compensation from that person." 50 U.S.C. §454(f), 62 Stat. 604, 80 P.L. 759 C.625

It may not be denied by reason of its length because its provisions are generous and substantial.

Both Board and court do your Petitioner grave injustice by regarding this legitimate request for a hearing as a device to relitigate or reopen a case that has been decided.

The so-called "Adjudication" by the Board bears no signature of any Board member and is not supported by the record. It is solely the opinion of Richard Witmer, Secretary, who signed it.

This statement is in error regarding the credit for military service voluntarily performed in wartime, and is further in error in its reference to voluntary extensions of service. There were no voluntary extensions of service for any portion of Petitioner's service for which credit is claimed. "Category commitments" may not be regarded as voluntary extensions of service. They were authorized for submission only by those officers whose "period of service" had been extended according to law, and who were

eligible for release from active duty if, under established policies of the War Department, they would request such relief. The category commitment was a strength accounting procedure by which the War Department would know how long non-regular officers would voluntarily remain on active duty. It may not be compared with a fixed term of enlistment for enlisted members of the Armed Forces, who were formally discharged before enlistment or reenlistment, so that they might receive a cash bonus for such enlistment or reenlistment, in addition to having their job rights, including retirement benefits, protected.

It is necessary to make a crucial distinction in this matter. The Commonwealth Court has heard pleadings of both parties in this dispute in three hearings. Certainly the court has heard the case but it has *not* adjudicated it. The court has not provided legal guidance the parties can lawfully follow. The court has not adjudicated the question of what law, what specific statute must be applied by the Board in allowing credit for Petitioner's military service. The court has not adjudicated the question of what law, what specific statute must be applied by Petitioner in determining the rate of payment of salary deductions that he must make to receive this credit. The court has heard but NOT adjudicated.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 2 Middle District Appeal Docket, 1983

ROBERT E. O'BRIEN,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYES' RETIREMENT SYSTEM,

Appellee

Appeal from Order of the Commonwealth Court of Pennsylvania of October 18, 1982 to No. 1268 C.D. 1982, sustaining the State Employes' Retirement System's Preliminary Objections

Argued: May 23, 1983

OPINION OF THE COURT
[469 A.2d 1008 (Pa. 1983)]

HUTCHINSON, J., Filed: December 14, 1983

Appellant filed a notice of appeal from Commonwealth Court's October 18, 1982 order dismissing what he characterizes as a petition addressed to that court's original

jurisdiction. In Commonwealth Court he sought an order requiring our Retirement Board to grant him a further hearing on the method of computing his state pension, a matter already twice determined on appellate review of final agency orders. Commonwealth Court, assuming it had original jurisdiction, nevertheless dismissed appellant's action as barred by *res judicata.*[1]

In this Court appellee renews its challenge to the Commonwealth Court's original jurisdiction under Section 761 of our Judicial Code. 42 Pa. C. S. §761. If, indeed, Commonwealth Court's jurisdiction over this case is appellate, *see,* 42 Pa. C. S. §763,[2] and not original, then appellant has no right of direct appeal to this Court under 42 Pa. C. S. §723(a), but must seek discretionary review on a petition for allocatur. *See* 42 Pa. C. S. §724. For the reasons that follow we agree with appellee that this action does not fall within Commonwealth Court's original jurisdiction and hold appellant has no right of direct appeal. Moreover, treating appellant's notice of appeal as a petition for allocatur, we grant it and affirm.[3]

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[1] The Commonwealth Court declined to address the jurisdictional question. It assumed, for the sake of argument, that it had original jurisdiction.

[2] The term original as used herein refers to cases originally commenced in Commonwealth Court, as required by Section 723(a) governing direct appeals to us, and to those cases falling within Commonwealth Court's "original jurisdiction" under Section 761, as that jurisdiction is limited by the assignment of other types of cases to its appellate jurisdiction. *See Commonwealth, Department of Aging v. Lindberg,* (J-185-83), —— Pa. ——, —— A.2d ——.

[3] We have reached this result in three other cases decided this day. *XPress Truck Lines, Inc. v. Pennsylvania Liquor Control*

Appellant retired from state service on June 30, 1967, entitled to a state pension. In applying for that pension he asked our Retirement Board to allow him to buy back his United State military service from February 17, 1941, when he was inducted from state service with our Welfare Department under the President's Executive Order, until his discharge on September 30, 1954. In December, 1969, appellant received notice from the then Secretary of the Retirement Board of an adjudication allowing him only five years of military buy back, from February 17, 1941 to February, 1946. From the opinion of the Dauphin County Court of Common Pleas, reported *sub nom State Employees Retirement Board v. O'Brien,* 93 Dauphin 101 (1970), at its No. 825 Commonwealth Docket, 1969, it appears appellant was eligible for release from the United States Armed Forces in February, 1946, but chose to remain on active duty until September 30, 1954.[4] Based on that fact, Dauphin County Common Pleas held petitioner was not entitled to buy back any military time beyond February, 1946, the date on which it determined he was eligible for release from federal military service. As a

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Board, (J-179-83), —— Pa. ——, —— A.2d ——, *Gossman v. Lower Chanceford Township Board of Supervisors,* (J-182-83), —— Pa. ——, —— A.2d —, and *Pennsylvania Department of Aging v. Lindberg,* (J-185-83), *supra.*

[4] According to Dauphin County Common Pleas there was no evidence in the record that he applied for discharge in February of 1946. Common Pleas stated that appellant had admitted he could have "phased out" military service in 1946 but elected to remain as an officer. Indeed, on October 18, 1947 appellant applied for and received a refund of his contributions to the State Retirement Fund.

matter of statutory interpretation Common Pleas held the legislature intended to allow buy back for federal military service between September 16, 1940 and July 27, 1953 only for the included time interval between induction from state employment under executive order and eligibility for release. Thus it held actual discharge did not control where a former state employee chose to remain in the federal armed forces after he was eligible for release. This decision affirmed the administrative adjudication limiting the statutory buy back to the period from compulsory induction to eligibility for discharge. The order so limiting the buy back became final when we denied appellant's request for allocatur on December 4, 1970 and the time for appeal or petition for certiorari to the United States Supreme Court expired. The section of the State Employes' Retirement Code of 1959 specifically applicable to appellant's claim was Section 207(1) of the Act of June 1, 1959, P.L. 392, *as amended,* 71 P.S §1725-207(1)[5] which provided:

> (1) A State employe who during the period from September 16, 1940, to July 27, 1953, entered into active military service, defined as full time service in the armed forces of the United States, under a requisition from or by executive order of the President of the United States, or in the armed forces organized for the defense of the Commonwealth by the authority of this Commonwealth, shall be allowed credit for the

[5] The legislature repealed the State Employes' Retirement Code of 1959, *as amended,* and replaced it with a consolidated statute, the State Employes' Retirement Code, Act of March 1, 1974, P.L. 125.

period during which he was in active military service and salary deductions were paid into the fund either during such active military service or thereafter in accordance with the provisions of article III, sections 301 and 302[6]

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[6] Dauphin County Common Pleas determined that the legislature did not intend to permit an employee to obtain credit under Section 207(1) for periods of voluntary military service following a period of compulsory service. This would seem to be a correct construction in view of the language in Section 301(3)(a) so limiting "current contributions" while a state employee is on military service. Dauphin County Common Pleas also mentioned a five year limit on credit for time served in the armed services in an apparent reference to Section 207(5) of the State Employes' Retirement Code. Coincidentally, Colonel O'Brien's term of compulsory service happens to also be the maximum period of military service any state employee who served in the military after September 16, 1940 can buy back under Section 207(5) of our State Employes' Retirement Code. However, prior to the effective date of the Act of December 12, 1968, P.L. 216, Section 207(5) applied only to state employees who were not in state employment before their military service. Thus, this action had no application to petitioner who retired from state service June 30, 1967. His military buy back was necessarily determined under Section 207(1) which then applied to persons inducted into the military while employed by the state. Indeed, as appellant notes, a buy back under Section 207(5) would have required him to contribute twice the amount that would have been deducted from his pay for state retirement while he was in the military, not simply the equivalent amount he finally paid for the five year buy back he was allowed under Section 207(1). In any event, the Board's decision to limit the Colonel's "buy back" to five years is *res judicata*. Commonwealth Court's reference to Section 207(5) in its most recent opinion and order from which this appeal was taken is simply *obiter dicta* and apparently results from the un-

Despite the September 8, 1970 final order of Dauphin County Court of Commn Pleas affirming appellant's buy back limitation to the five year period of his compulsory military service, he remained dissatisfied. Repeated requests to appear again before the Retirement Board were denied, culminating in the Board's formal dismissal of what he called a petition for "Determination of Manner of Payment of Salary Deductions," at the Board's January 30, 1973 meeting. Appellant sought appellate review of this dismissal in the Commonwealth Court. Commonwealth Court affirmed the Board's refusal to allow him to appear before it, holding that his claim was barred by *res judicata* and his request for an administrative hearing on the method of computation was unnecessary. *O'Brien v. State Employes' Retirement Board,* 12 Pa. Commonwealth Ct. 49, 315 A.2d 899 (1974). In denying appellant's request for an administrative hearing, the court held determination of the amount of appellant's pension, following Dauphin County Court of Common Pleas' September 8, 1970 decision, was a mere matter of mathematical computation, not adjudicatory in nature, and therefore not of the type for which a hearing is required.

Appellant attempted to breathe life into the same cause of action again when in February of 1981 he sought to appear before the Board to reargue the service record used to calculate his retirement and assert a claim for additional credit for military service. The Board permitted appellant to appear before it but denied his request

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derstandable failure of a busy court to fully trace the legislative history of Section 207(5) to determine its text when appellant retired.

for an administrative hearing. He then filed the instant Petition for Review in Commonwealth Court seeking a hearing before the Board ostensibly to determine under which section of the applicable law, 207(1) or 207(5), the retirement deductions covering his military service buy back should have been calculated.[7] The Commonwealth filed preliminary objections asserting *res judicata* and lack of original jurisdiction in Commonwealth Court. Once again Commonwealth Court determined that the thrust of the petition was to relitigate the intent of the statute which was litigated previously. Consequently, Commonwealth Court sustained the Board's preliminary objections. It decided the matter based on appellant's petition, appellee's preliminary objections, and its own judicial notice of previous proceedings in the matter. It did not hold a hearing or require additional testimony.

We believe the recitation of these facts will help demonstrate the practical reasons of economy of judicial resources which underlie our holding that an action to compel an administrative agency which has finally denied a request for hearing to hold one is, as a matter of statutory interpretation, addressed to the appellate jurisdiction of Commonwealth Court under Section 763 of the Judicial Code, not an action "originally" commenced in Commonwealth Court as required by Section 723(a) governing di-

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[7] A fair reading of Colonel O'Brien's *pro se* petition to Commonwealth Court shows that he is challenging the Dauphin County Court of Common Pleas 1970 decision, which limited his credit for military service under Section 207(1) to the period from February 17, 1941 to February, 1946, the period of his compulsory military service.

rect appeals to this Court as of right. *See Commonwealth, Department of Aging v. Lindberg,* (J-185-83), Pa. , A.2d . Moreover, as a matter addressed to Commonwealth Court's appellate jurisdiction it cannot be the subject of an appeal to this Court as of right under Section 723(a).

Were we to treat this action as one originally commenced in the Commonwealth Court under 42 Pa. C.S. §723(a), this appellant and any other litigant dissatisfied with an agency determination reviewable in that court's appellate jurisdiction, and thus appealable here only in the exercise of our sound discretion, could nevertheless appeal to us as of right. This could be accomplished by the simple expedient of requesting the agency to hear again a matter already finally determined and, if refused, by commencing an action under Section 761 to compel an agency hearing. Moreover, such review could be obtained not just once, but again and again in an infinitely recursive loop persisting as long as a dissatisfied litigant desired.[8] We are not inclined to interpret our jurisdictional statutes in such a manner.

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[8] Of course, if an agency refuses to act on a request for hearing in an effort to avoid a final decision that allows appeal, Commonwealth Court would certainly not be powerless to proceed originally under Section 761. Such power is necessary to insure against wholly arbitrary agency refusals to act (a) when such refusals would deny fundamental constitutional rights or due process without any adequate alternative remedy or (b) when an action is wholly arbitrary but not final. *Bethlehem Mines Corp. v. Commonwealth,* 462 Pa. 207, 340 A.2d 435 (1975). *See also Ezy Parks v. Larsen,* —— Pa. ——, 454 A.2d 928 (1982).

We note that the language of Section 761, and particularly Section 761(c)[9], when read with Section 723 may seem to require such a recursive construction. Such dilemmas are not uncommon in dealing with jurisdiction and the jurisdiction to determine it. In such cases we must look beyond the seemingly unbreakable ring to which the language leads and consider the effects of breaking the ring at one or the other of its available points, appealing to a higher order of construction to attain a practical result.

We think such practicality is best served by today's holding that efforts to compel agencies to hold hearings they have finally refused are properly addressed to the Commonwealth Court's appellate jurisdiction and thereafter on appeal from its final order to our discretionary jurisdiction.

In cases of possible doubt as to whether a matter should be addressed to us by way of appeal or allocatur, we suggest in the exercise of our supervisory power that requests for our review presented fully in a manner analogous to that set forth for a petition for allocatur instead of as in a simple notice of appeal.[10] In such cases the

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[9] We believe Section 761(c) is best explained as an attempt to codify *Bethlehem Mines Corp.* and remove the apparent lack of symmetry theretofore existing between the express grant of original jurisdiction to issue prohibition and mandamus to Superior Court but not Commonwealth Court. *See Lindberg, supra.*

[10] Such appeals should include a concise statement of the grounds on which the jurisdiction of this Court and the statutory provision believed to confer jurisdiction is invoked and, if deemed necessary, the cases believed to sustain jurisdiction. See Rules of the Supreme Court of the United States 12.3 and 15.

party requesting relief can seek it alternatively under Sections 723 and 724. Such procedure will make it more likely that the matter will receive our proper attention, whether it is correctly an appeal as of right or by grace, and at the same time forestall possible dismissal for lack of jurisdiction at a time when it is too late to seek allocatur.

Bearing these considerations in mind we dismiss appellant's appeal as of right, treat his notice of appeal as a petition for allocatur and, as such, grant it and affirm the Order of Commonwealth Court.

Order Affirmed.

Mr. Justice Nix did not participate in the consideration or the decision of this case.

Chief Justice Roberts and Mr. Justice McDermott concur in the result.

Opinion and Judgment of Supreme Court of Pa.

IN THE SUPREME COURT OF PENNSYLVANIA
Harrisburg District

No. 2 M. D. Appeal Docket 1983

Robert E. O'Brien,

Appellant

v.

Commonwealth of Pennsylvania, State Employes' Retirement System

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JUDGMENT

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Order of the Commonwealth Court is affirmed.

(s) Mildred E. Williamson

Dated: December 14, 1983

Letter Dated Feb. 6, 1984

APPENDIX B

SUPREME COURT OF PENNSYLVANIA
Middle District

Carl Rice, Esq.
Prothonotary
Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

February 6, 1984

Thomas E. Sterling, Esquire
P. O. Box 14
State College, Pa. 16801

Re: O'Brien, Appellant v. Commonwealth, State Employees' Retirement System
No. 2 M. D. Appeal Docket 1983

Dear Mr. Sterling:

This is to advise that on February 3, 1984 the Supreme Court entered its Order denying the Application for Reconsideration filed in the above-captioned matter.

Very truly yours,
(s) Mildred E. Williamson
Deputy Prothonotary

MEW/sb
cc: Marsha V. Mills, Esquire
Hon. James Crumlish

Opinion and Order of Commonwealth Court of Pa., 10-18-82

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1268 C.D. 1982

ROBERT E. O'BRIEN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYES' RETIREMENT SYSTEM,

Respondent

Before: Paul S. Lehman, Senior Judge
Heard: October 12, 1982

Memorandum Opinion and Order by Senior Judge Lehman, Filed: October 18, 1982

The petitioner was employed by the Commonwealth prior to 1941 and in that year he entered military service which lasted through 1957. He was re-employed by the Commonwealth in 1961 and thereafter he sought to purchase retirement credit for the entire period that he was in the military. The State Employes' Retirement Board

(Board) permitted credit for only five of those years and that decision was affirmed by the Court of Common Pleas of Dauphin County, sitting as the Commonwealth Court. *State Employes' Retirement Board v. O'Brien,* 93 Dauph. 101 (1970). The Supreme Court denied allocatur in December of 1970. The Board then computed his retirement account, but the petitioner sought a hearing and recomputation of his benefits. He brought suit before the Commonwealth Court to obtain such a hearing and the Court denied his request on the grounds that the computation of his account was a purely ministerial act for which no hearing was required and because the petitioner actually sought only to relitigate the issue of his entitlement to additional credit for military service which was barred by res judicata. *O'Brien v. State Employes' Retirement Board,* 12 Pa. Commonwealth Ct. 49, 315 A.2d 899 (1974). The petitioner has again requested a hearing from the Board to determine under what section of the applicable law, the State Employes' Retirement Code of 1959, Act of June 1, 1959, P.L. 392, *as amended,* 77 P.S. §§1725-101 –1725-809, his retirement deductions are being withheld. The Board refused his request and this action was brought in our original jurisdiction to challenge the Board's decision.

The Board has filed preliminary objections contending that this action should have been brought under this Court's appellate, not original, jurisdiction and that it is barred by the running of the appeal period and that this action is barred by res judicata.

The petitioner maintains that this is an action in mandamus to compel a hearing properly heard in our original jurisdiction and that res judicata does not apply here

because he has a continuing right to know under what section of the law his salary deductions are being withheld and that the Board has refused to disclose that information.

For the sake of argument, we will accept the petitioner's contention that we have original jurisdiction in this case, but we must nevertheless dismiss the action as being barred by res judicata.

At the hearing in this matter, the petitioner himself continually asserted that his salary deductions were incorrect because the court of common pleas had originally erred in limiting his military service credit to five years. It is evident that the hearing requested here is nothing more than a device by which the petitioner would again attempt to relitigate the intent of the statute which was decided previously. As we have earlier held, such an action is barred by res judicata. *O'Brien v. State Employes' Retirement Board,* 12 Pa. Commonwealth Ct. 49, 315 A.2d 899 (1974).

Moreover, at argument, counsel for the Board informed the petitioner that his salary deductions were being computed under Section 207(1) of the Act, 77 P.S. §1725-207(1). It was explained that the prior decision of the court of common pleas, in interpreting the entire act found that computation of the petitioner's retirement account under Section 207(1) was subject to the five-year limitation on credit for military service contained in Section 207(5) of the Act, 77 P.S. §1725-207(5). The disclosure of such information would seem to obviate the need for the hearing which the petitioner seeks.

Opinion and Order of Commonwealth Court of Pa., 10-18-82

We will grant the Board's preliminary objections.

(s) Paul S. Lehman
Paul S. Lehman
Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1268 C.D. 1982

ROBERT E. O'BRIEN,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYES' RETIREMENT SYSTEM,

Respondent

ORDER

AND NOW, this 18th day of October, 1982, upon consideration of the respondent's preliminary objections in the above-captioned matter, it is ordered that said objection asserting that the matter is barred by res judicata be sustained.

(s) Paul S. Lehman
Paul S. Lehman, Senior Judge

Opinion and Order of Commonwealth Court of Pa., 10-18-82

ORDER

NOW, December 7, 1982, having considered petitioner's application for reconsideration, respondent's answer thereto and petitioner's reply to answer to application for reconsideration, said application is hereby denied.

BY THE COURT:

(s) James C. Crumlish

P.J.

APPENDIX D

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 275 C.D. 1973

ROBERT E. O'BRIEN

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA STATE EMPLOYES' RETIREMENT BOARD,

Appellee

Before:

Honorable James C. Crumlish, Jr., Judge

Honorable Harry A. Kramer, Judge

Honorable Roy Wilkinson, Jr., Judge

Honorable Glenn E. Mencer, Judge

Honorable Theodore O. Rogers, Judge

Honorable Genevieve Blatt, Judge

Argued: December 4, 1973

Opinion and Order of Commonwealth Court of Pa., 3-5-74

OPINION

[12 Pa. Commonwealth Ct. 49, 315 A.2d 899 (1974)]

Opinion by Judge Crumlish, Jr., Filed: March 5, 1974

This is an appeal from a determination of the State Employes' Retirement Board (Board) which denied Robert E. O'Brien's request to appear before the Board.

O'Brien (Appellant) was employed by the Commonwealth of Pennsylvania from December 30, 1933, until March 6, 1941, and was a member of the State Employes' Retirement Association. On February 17, 1941, Appellant was called into active military service by Executive Order of the President of the United States. He served under the Mandatory Executive Order until his eligibility for release in February 1946, when, he chose to apply for continuation of his active service. On October 18, 1947, he applied for and received refund of his contributions to the State Retirement Fund.

The Appellant continued in active military service during the Korean Conflict by extending his category commitment in 1951 and again in 1954. On June 11, 1957, the Appellant resigned from State Employment. The Appellant retired from military service effective November 1, 1960, and on May 9, 1961, and then became employed by the Pennsylvania State University as an Associate Professor. From May 9, 1961, until his retirement on July 1, 1967, Appellant was a member of the State Retirement Plan.

Subsequently, Appellant requested the Board for military service credit toward retirement for the period Feb-

ruary 17, 1941 to September 30, 1957. The Board denied this request, determining that Appellant was entitled to a military service credit for a period from February 14, 1941, to February 1946, which was the period of Appellant's compulsory military service. The Board determined that Section 207 of the State Employes' Retirement Code of 1959, Act of June 1, 1959, P.L. 392, as amended, 71 P.S. 1725-207 precluded Appellant from receiving credit for the balance of his military service which he voluntarily extended.

This Commonwealth Court in *State Employes' Retirement Board v. O'Brien,* 93 Dauph. 101 (1970), agreed with the Board's interpretation and dismissed the appeal. On December 4, 1970, the Pennsylvania Supreme Court denied Appellant's "Petition for Leave to File for Allowance of Appeal".

Appellant again requested permission to appear before the Board to discuss the amount and manner of payment of salary deductions for his retirement benefits. At that meeting, the Board concluded that he should not make another repetitive personal appearance. Appellant was advised on June 24, 1971 that it had been determined that he owed $418.95 if he wanted to receive credit for the military service allowed. This calculation was approved by the actuary for the Board.

On February 14, 1972, and May 19, 1972, Appellant made further requests to appear before the Board and on November 6, 1972, he filed a Petition for Determination and Manner of Payment of Salary Deductions with another request for a personal appearance. The Board discussed the Petition at its January 30, 1973 meeting and

denied the Appellant's request for an appearance before the Board "because of the prior legal history of this matter, and further for the reason that the money required to purchase the military service was a determination that required only routine administrative staff review and approval as that of the Actuary for the Board."

The soundness of this decision is now before this Court.

Initially, we must observe that the Appellant attempts to use this particular appeal as a vehicle to gain reconsideration of this Court's decision in *State Employes' Retirement Board, supra.* Much of Appellant's brief is devoted to a detailed discussion of why Appellant's retirement credit should be extended to the period Appellant voluntarily remained in the military service, the specific issue which was decided against him in *State Employes' Retirement Board, supra.*

Appellees answer this portion of the Appellant's argument by arguing the doctrine of res judicata. Since we feel it is obvious that the requirements of res judicata are present in this case, *American Surety Co. of N.Y. v. Dickson,* 345 Pa. 328, 28 A.2d 316 (1942), we will not discuss it in detail.

Appellant also contends that he was arbitrarily denied a hearing before the Board on the amount and manner of payment of salary deductions. We disagree.

It is obvious that the Board, in denying Appellant's request for a hearing, felt that Appellant would use the hearing as a forum to espouse his unwaivering position that he was entitled to credit for his entire military ser-

vice.[1] The Board felt in addition, that our decision in *State Employes' Retirement Board, supra,* resolved the legal issues involved against Appellant, and all that remained, following the guidelines of the above-quoted case, was a mere computation of the amount owed by Appellant.

We agree that it was not necessary in this case to afford the Appellant another personal appearance before the Board. A review of the record makes it abundantly clear that the Board has made a laudable effort throughout the long history of this matter to answer all inquiries and requests of Appellant. Appellant has appeared before the Board in the past with and without counsel. We do not conceive how Appellant, in still another appearance before the Board, could add anything to the already beleaguered case history of this matter. Nor can we see how any rights of Appellant were adversely affected by the Board's failure to grant Appellant a personal appearance. After our adjudication in *State Employes' Retirement Board, supra,* all that was left for the Board to do was to merely calculate the dollar amount owed by Appellant. This action is not adjudicatory in nature, but a mere computation based on prior judicial findings and no hearing or personal appearance before the Board was required.

The Appellant presents nothing to seriously dispute the dollar amount ($418.95) assessed by the Board. We should note, in the hopes that this is a final disposition of this matter, that we have reviewed the manner and means of calculation of the Board and find their figures are correct. Appellant has received the consideration and the pa-

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[1] This conclusion was well-founded since the Appellant did in fact use this tactic in his argument before this Court.

tience of the Board and this Court and it is now incumbent on him to pay the assessed amount ($418.95) (if he so desires) so that he may receive the retirement benefits to which he is legally entitled. Accordingly, we enter the following

ORDER

AND NOW, this 5th day of March, 1974, the determination of the State Employes' Retirement Board's setting Robert E. O'Brien's military credit at $418.95 is hereby affirmed.

(s) James C. Crumlish, Jr.
James C. Crumlish, Jr., Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

No. 825 Commonwealth Docket 1969

COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYES' RETIREMENT BOARD

v.

ROBERT E. O'BRIEN

OPINION

[93 Dauphin 101]

Lt. Col. Robert E. O'Brien, USA (ret.) has appealed an adjudication of the State Employes' Retirement Board which he erroneously contends improperly limits his benefits as a retired employee of the Commonwealth.

Appellant was appointed a Clerk by the Pennsylvania Liquor Control Board on December 30, 1933 at an annual salary of Thirteen Hundred Eighty Dollars ($1,380.00). On January 7, 1939, he transferred to the Department of Public Assistance (now Welfare) where he served as a Zone Supervisor at the annual salary of Two Thousand

One Hundred Dollars ($2,100.00). On February 17, 1941, he entered the Pennsylvania National Guard and was called to active duty January 27, 1942. He served under Mandatory Executive Order until his eligibility for release in February 1946. There is no evidence in the record that he applied for discharge from active military duty at that time; on the contrary, he continued on active duty and on October 18, 1947, he applied for and received refund of his contributions to the State Retirement Fund. Likewise, on March 17, 1948, he applied for continuation of his active military status and it was renewed in 1951 for a period expiring September 30, 1954 at which time he was discharged. There is no evidence of the nature of his subsequent employment, if any, until May 9, 1961, when he was employed by Pennsylvania State University as an Associate Professor at an annual salary of Ten Thousand Three Dollars and Twenty Cents ($10,003.20). He retired from this employment with the Pennsylvania State University on July 1, 1967. There is no record of his salary at the date of military discharge or the pension benefits resulting therefrom.

The adjudication of the Board in fixing appellant's retirement benefit held that appellant was entitled to a military service credit for a period from February 17, 1941 to February 1946, the period of compulsory military service; but that he was not entitled to credit for the balance of his military service which was voluntarily extended.

Appellant contends, however, that he should receive credit for military service from February 17, 1941 until September 30, 1954. To support his position, he sub-

mitted a check when he was engaged by Pennsylvania State University to cover contributions he would have made to the Fund had he continued in state service during that entire period.

He relies on Section 207 of the State Employes' Retirement Code of 1959, Act of June 1, 1959, P.L. 392, as amended (71 P.S. 1725-207(1)). This section entitled "Credit for Military Service" provides that any state employee who during the period from September 16, 1940 to July 27, 1954, entered the active military service of the United States "under a requisition from or by executive order of the President" shall be allowed credit for the period during which he was in active military service and salary deductions were paid into the Fund during such active service or thereafter in accordance with the provisions of Sections 301 and 302.

To evaluate the merit of Lt. Col. O'Brien's position we must determine the intent of the Legislature in its wise enactment of law concerning the rights and duties of all members of the State Government and the rights of all the citizens whose tax support sustains their employees' rights.

The Legislature contemplated a two-fold remuneration in encouraging faithful, dedicated, experienced personnel to move the wheels of government. First, an employee to perform at prime function must have economic security. With that he then has the confidence and the willingness to adapt himself to constantly increasing demands. He develops a "know how" which in time becomes incalculable valuable experience. This is the second and vitally important consideration which the Legislature

measured. The need for long suffering fidelity to a cause could be met to some degree by a suitable pension program. The resultant benefit to the taxpayers is obvious.

We are reminded in the fulfillment of the purpose of the Act that in time of national jeopardy it is right that the individual States should and must allow their employees to seek out or be sought to serve their county. But there must be clear national jeopardy calling for the maximum efforts of all its citizens, military and civilian alike on a daily basis. To this end, certain liberal advantages were offered to these State employees. Among them is the one upon which Lt. Col. O'Brien relies.

To undress the situation in which appellant places himself, we take notice that by his own admission he could have phased out of military service in 1946 but he elected to maintain the status he enjoyed. All of this time he served as a potential career officer, he was establishing valuable pension credit time with the Federal Government which is now a vested interest. We would be naive if we believed that he did not calculate the value of an additional expanded pension when he returned to State government in 1961 after two repeated voluntary "commitments" in the Armed Service.

We think it inconceivable that the Legislature, in its wise calculation of the affairs of the state employees and the interest of the taxpayers would have considered as meritorious the situation of one, who having left state employment for military service cemented his departure by a series of acts including voluntary extensions of military service could then claim this kind of dual pension right.

To assume, as appellant did, that his situation is covered by the blanket generality "military service" in Section 207 is erroneous when considering the Act in its entirety. The Act specifically limits eligibility to five years thus recognizing the possibility of state employees using career military service as an opportunity to enhance retirement benefits.

In *Etters v. State Employes' Retirement Board,* 83 Dauph. 1 (1964), this Court similarly expressed itself as to the rationale for granting retirement benefits to State employees rendering a military service obligation. In considering a like argument, under the Act of June 7, 1917, P.L. 600 (now repealed), the Court said:

> "The right to membership in the System is not and should not be equated to career officers or enlisted men who choose to remain in military service as a matter of personal preference. The Legislature certainly did not intend to grant valuable retirement benefits to persons based upon service in the United States Armed Forces rather than service to the Commonwealth. In fact, the intention is clear that the Legislature sought to grant valuable retirement benefits to State employes who render long and faithful service to the Commonwealth and not to career personnel of the United States Armed Forces."

In short, it is the judgment of this Court that one cannot establish a base for pension benefits within the structure of the State Retirement System, embark on a substantial military career with its attendant economic benefit including Federal pension rights and then return

to State service and seek credit for all of the period of military service in calculation of his State retirement benefits.

We conclude that the adjudication of the Board is amply supported by the record and that it correctly interprets the statute in question.

Accordingly, we make the following

ORDER

AND NOW, September 8, 1970, the adjudication of the State Employes' Retirement Board is affirmed, and the appeal is dismissed at the cost of appellant.

BY THE COURT:

(s) James C. Crumlish, Jr., J.
Commonwealth Court of Pennsylvania Specially Assigned

APPENDIX F

VERBATIM TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend XIV:

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pa. State Employes' Retirement Code of 1959

71 Pa. Stat. Ann. §1725-207 (1)

§207. Credit for Military Service.

(1) A state employe who during the period from September 16, 1940, to July 27, 1953, entered into active military service, defined as full time service in the armed forces of the United States, under a requisition from or by executive order of the President of the United States, or in the armed forces organized for the defense of the Commonwealth by the authority of this Commonwealth, shall be allowed credit for the period during which he was

in active military service and salary deductions were paid into the fund either during such active military service or thereafter in accordance with the provisions of article III. §301 and 302.

71 Pa. Stat. Ann. §1725-207 (5)

§207. Credit for Military Service

(5) Any State employe who is a contributor and who served in the armed forces of the United States subsequent to September 16, 1940, and who was not a State employe prior to such period of military service and who commenced State employment within three (3) years from date of release from active duty, shall be entitled to have full credit for each year or fraction thereof not to exceed five (5) years of the service in the armed forces of the United States upon his payment to the fund of back contributions according to the provisions of article III, §302 subsection (2). (New subsection 5 added in 1965.)

71 Pa. Stat. Ann. §1725-207 (5)

§207. Credit for Military Service

* * *

(5) Any State employe who is a contributor and who served in the armed forces of the United States subsequent to September 16, 1940, [and who was not a State employe prior to such period of military service] and who commences or returned to State employment within three (3) years from date of release from active duty, shall be entitled to have full credit for each year or fraction thereof not to exceed five (5) years of the service in the armed forces of the United States upon his payment to the fund

of back contributions according to the provisions of article III, §302 subsection (2). (Subsection (5) amended in 1968.)

71 Pa. Stat. Ann. §1725-302 (2) (i)

§302. Members' Contributions on Account of Past Service.

(2) The following members are entitled to make contributions on account of past service according to the provisions of subsection (1) of this section:

(i) A State employe who entered active military service between (December 7, 1941,) September 16, 1940, and July 27, 1953, and who does not elect to pay into the fund during the period of his active military service an amount equal to his salary deductions, may, during the period of such active military service or at any time after completion of such active military service and return to State service, pay into the fund an amount which shall be equal to the periodic salary deductions multiplied by the number of the pay periods during which he was absent from State employment or State service in active military service to the credit of the members' annuity savings account in such manner as may be agreed upon by the State employe and the retirement board, but in no event shall such payments be made in installments less than sufficient to pay such amount by the time the member attains superannuation retirement age.

71 Pa. Stat. Ann. §1725-302 (2) (k) (b)

§302. Members' Contributions on Account of Past Service.

(2) The following members are entitled to make contributions on account of past service according to the provisions of subsection (1) of this section:

• • •

(k) Any State employe entitled to credit for military service under the provisions of article II, section 207 [subsection] *subsections* (4) and (5) shall pay into the retirement fund (a) an amount equal to the contributions which would have been collected from him had he been in State service during the period he served in the Armed Forces of the United States computed with reference to the compensation he received upon entry into State service and his current percentage of salary deductions, and (b) an additional amount as the equivalent of the contributions of the Commonwealth on account of such military service. Such back payments may be paid in a lump sum or by installments as may be approved by the retirement board. (Par. k of subsection (2) amended in 1965.)

Office - Supreme Court, U.S.
FILED
MAY 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1499

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT E. O'BRIEN
Petitioner

v.

PENNSYLVANIA STATE EMPLOYES'
RETIREMENT SYSTEM
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

John P. Krill
Deputy General Counsel
Attorney for Respondent

Office of General Counsel
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(717) 783-6563

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a substantial federal question exists over which this court may take jurisdiction, when none is shown to have been raised in the state court proceedings below?

2. Whether due process of law is violated when a state's highest court applies its doctrine of *res judicata* to a cause pressed twice before by petitioner in lower courts and, in dismissing his appeal, corrects a citation to an inapplicable statute by the lower court?

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TABLE OF AUTHORITIES

Cases:	Page(s)
Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982)	5

Statutes & Authorities:

28 U.S.C. §1257(3) 1,3

Rules of Court:

Sup. Ct. R. 21.1(h) 3

COUNTER-STATEMENT OF JURISDICTION

There is no basis for the exercise of jurisdiction under 28 U.S.C. §1257(3), invoked by Petitioner, or otherwise. The decision of the Supreme Court of Pennsylvania rested entirely on principles of state law. Petitioner's claims of a denial of due process of law and equal protection of the law are not shown to have been presented to the Supreme Court of Pennsylvania or to the lower state court.

SUMMARY OF ARGUMENT

There is no basis for the Court to exercise jurisdiction since the Pennsylvania Supreme Court's decision rests on state law and no federal question is shown to have been presented to it or to the lower court. In any event, the doctrines of due process and equal protection are not violated when a state court applies its doctrine of res judicata in a case pressed by petitioner twice before in lower courts.

ARGUMENT

I. THERE IS NO BASIS FOR THE EXERCISE OF JURISDICTION

The Pennsylvania Supreme Court's decision rests entirely on state law principles of res judicata. Petitioner does not specify the stage in the proceedings of either court at which he raised any federal questions or how he attempted to do so. This omission violates Rule 21.1(h) of the Court. It also deprives the Court of a basis upon which it may exercise jurisdiction, because no federally-protected right, privilege or immunity is shown to have been "set up or claimed" in the state courts as required by 28 U.S.C. §1257(3), invoked by Petitioner.

II. NO SUBSTANTIAL FEDERAL QUESTION EXISTS

The Pennsylvania Supreme Court dismissed Mr. O'Brien's appeal on grounds of res judicata because he had litigated the same claim, not once, but twice before in lower courts. The Pennsylvania Supreme Court based its decision on the same statute that had been construed against Mr. O'Brien in 1970 by the Dauphin County Court and again in 1974 by the Commonwealth Court.

The gravamen of the Petition seems to be that Mr. O'Brien was denied due process and equal protection when the Commonwealth Court, in its 1982 decision dismissing O'Brien's third petition, cited an inapplicable collateral provision of the state retirement laws, in addition to the provision on which the earlier decisions were based. The Pennsylvania Supreme

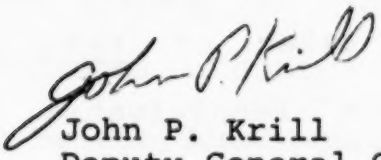
Court corrected this harmless error, calling it "obiter dicta", and found the true basis for applying its doctrine of res judicata. (See Appendix A of Petition at page 5a, footnote 6).

Since Mr. O'Brien was a party to all prior proceedings and was heard by each court before each decision was issued, no substantial federal question exists. The rules of res judicata applied by the Pennsylvania Supreme Court need do no more than meet minimal procedural requirements of federal constitutional law. Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). They have more than done so in this case.

CONCLUSION

For the foregoing reasons, respondent asks the Court to deny the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,



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